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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

RAMZY AYYAD et al., Plaintiffs and Respondents, v. SPRINT SPECTRUM, L.P. et al., Defendants and Appellants.	A121948 (Alameda County Super. Ct. No. RB03121510)

Appellants Sprint Spectrum, L.P. and Wirelessco., L.P. (collectively Sprint) asked the trial court to seal significant portions of testimonial and documentary evidence about its business finances and practices it had already presented in a consumer class action jury trial on the ground they contained confidential proprietary trade secret information. The court permitted Sprint to pursue its mid-trial motion on an expedited briefing schedule and thereafter denied the motion (with a limited exception), in part because it found Sprint's evidentiary showing inadequate to support the requested orders. The court denied Sprint's request for leave to supplement its evidence except as to one exhibit. Sprint argues the court abused its discretion in requiring briefing and hearing on limited notice, and in denying its motion to augment its evidence. We affirm.

BACKGROUND

This case against Sprint, challenging its policy of charging early termination fees (ETF's) to customers cancelling service prior to expiration of defined contract periods, was coordinated in 2003 with similar actions against other wireless carriers. (*In re Cellphone Termination Fee Cases* (Super. Ct. Alameda County, 2003, JCCP No. 4332).)

In May 2008, this case was severed and remanded for trial. The outcome of the trial is not at issue in this appeal.

To contest plaintiffs' claims that the ETF's were unlawful liquidated damage provisions, Sprint sought to prove that its actual damages were substantially greater than the fees charged. Its evidence included information concerning Sprint's costs, revenues, the frequency and timing of early customer contract terminations, and its efforts to collect ETF's. It alleges that much of this information is confidential and proprietary, and constitutes trade secrets.

Discovery in the coordinated proceeding was governed by a June 2004 protective order. The order provided that trade secret or confidential business information could be designated "Confidential," in which case it generally could be disclosed only to persons involved in the litigation for purposes of the litigation. "[H]ighly competitively sensitive" material could be designated "Confidential – Outside Counsel's Eyes Only," in which case it generally could be disclosed only to outside counsel and court personnel for purposes of the litigation. The protective order expressly did "not preclude, limit, restrict, or otherwise apply to the use of information at trial." It also expressly provided that "[t]he Court [would] at a future time determine the appropriate treatment of Protected Materials at trial, consistent with [former] California Rule of Court 243.2[1] and other applicable law."

As trial approached in 2008, Sprint filed motions to seal certain pretrial filings, including a trial brief and motions in limine. The court granted these motions. Sprint did not, however, file a pretrial motion to seal testimony or exhibits that it anticipated would be disclosed in open court or received in evidence at trial. Nor did Sprint make a motion, orally or in writing, to seal testimony or exhibits at the time they were disclosed in open court or received in evidence at trial. Rather, Sprint explains that it "monitored the persons present in the courtroom gallery, and before testimony concerning sensitive

[1] All rule references are to the California Rules of Court. Former rule 243.2 has since been renumbered as rule 2.551.

information [was given], Sprint asked spectators who were not entitled to access this information under the protective order to leave the court room."[2]

Trial began in May 2008, and testimony continued at least through June 4. By June 9 the jury was deliberating, and it returned a verdict on June 12.

On June 4, 2008, a news story was published that quoted from Plaintiffs' opening statement. On June 5, Sprint applied ex parte for an order temporarily sealing portions of the trial transcripts for May 30 and June 2, which allegedly contained confidential, proprietary information. Sprint's supporting declaration described Sprint's discovery of the news article and its attempts to contact opposing counsel, and identified and attached the transcript excerpts Sprint sought to have sealed. The declaration set forth counsel's conclusions that information contained in the transcripts was "confidential and highly proprietary," but did not attempt to provide facts in support of Sprint's contention that disclosure would "yield a competitive disadvantage to Sprint, which would in turn hinder Sprint's ability to compete effectively in the cellular industry" or to show that Sprint's interest in protecting the information outweighed the presumption of public access to trial records.

In a June 6, 2008 order, the court temporarily sealed the transcripts and set a hearing for June 10. The court ordered Sprint to file a motion to seal the next day, on Friday, June 7, and Plaintiffs and other interested parties to file oppositions on Monday, June 9. The court explained, "The Court sets this expedited schedule because the trial is on going and as a general proposition trials are in open court unless some party can meet the standards of C.R.C. 2.550 et seq. . . . The Court also needs to be able to promptly instruct the jurors about any limitations before they are discharged. Finally, an exhibit to Sprint's application states that the FCC will be conducting a hearing on ETFs on

[2] Sprint quite obviously had no authority to limit or otherwise control public access to the courtroom. As discussed *post*, the record reflects no motion by Sprint asking the court to restrict courtroom access or to exclude members of the public generally from attendance.

Thursday, June 12, 2008. (Savelle Dec., Exh. A.) This suggests that the testimony might concern a matter of immediate public interest. [Citation.]"

On June 6, 2008, Sprint filed a motion to seal that covered not only the previously designated trial transcript excerpts but also several additional transcript excerpts and trial exhibits. Sprint's declaration in support of the motion simply identified and attached the records Sprint wanted sealed. Plaintiffs filed a timely opposition. The court issued a tentative decision denying the motion, citing the lack of evidentiary support for the claimed confidential nature of the information and the fact that the information had already been disclosed in open court.

At a June 10, 2008 hearing, Sprint told the court it "believe[d] that it was complying with California Court rules 2.550 and 2.551 when it submitted a memorandum addressing the merits of the motions and the declaration attaching the documents on which the motion was based, which is what Sprint had filed in the past in support of its motion[s] to seal. [¶] However, if the Court is requiring a more substantial declaration . . . then Sprint would request leave to prepare and file such a declaration which I believe they could put on record tomorrow."

On the issue of disclosure of the information in open court, Sprint argued it "did not intend to waive its right to claim that the testimony or evidence presented in Court contained confidential information. The parties were moving quickly so as not to delay the proceedings or waste any of the jury's time. And Sprint didn't feel that it was appropriate to argue the full merits of the motion to seal each time confidential material might be disclosed in court. [¶] However, when possible, Sprint did try to protect this information. So for example, in advance of Mr. Souder and Mr. Franklin testifying, Sprint did ask that the courtroom be closed to any in-house counsel of the competitive carriers." The court responded: "[A]s I recall it, there was certainly something raised by Sprint with respect to the fact that there might be some confidential information and that that would be brought to the Court's attention . . . . [¶] . . . [¶] if there was some concern at the time a topic was being raised. And I think the other day when that first came up, I think it might have been Mr. Gresham indicating, well, when we looked around and we

only saw counsel here who were covered by the protective order so we didn't say anything. Well, we have a public record that's being created by a transcript. It goes way beyond anyone sitting here in the courtroom."[3]

On the merits of the motion, Sprint argued the testimony and exhibits it wanted sealed fell into two broad categories of confidential business information. "[T]he first would be Sprint's confidential financial data, including cost[s], capital expenditures, subsidy data, [and] revenue figures, including a lot of recent costs and profitability calculations. [¶] The second category would be Sprint's proprietary practices. This would include collection practices, pricing strategies, [and the] operational parameters of its network. . . . [¶] And there are really two concerns with releasing this type of information to the public. The first is that it could end up in the hands of Sprint's competitors, which would give those competitors an unfair advantage, allow them to discern Sprint's strengths and weaknesses, target any weak points, possibly imitate and discuss their policies, all of which would prejudice Sprint. [¶] . . . [¶] The second concern was releasing this type of information to the public and then it could end up being used by members of the public in a manner that is not in any way related to examining the basis for judicial decision-making, which is really the reason that records are kept open. [¶] So for example, Sprint is moving to seal testimony from Jay Franklin regarding Sprint's collection practices and collectability rates. If that type of information were to get into the public domain, then Sprint's customers or potential customers could look at

[3] Plaintiffs similarly stated, "I think the Court raised this issue with the parties in advance of trial and suggested that something be done about this, and nothing was done about it. [¶] We've heard that Sprint took steps to ensure sort of voluntary compliance when . . . they asked to clear the courtroom. But I didn't hear that announced in court, and I didn't see anybody standing by the door to make sure that nobody came in during the middle of that testimony or that anything was announced or done to ensure that that information wasn't released publicly. [¶] . . . [¶] The other thing is that a lot of this information, I think the vast majority of it, came in in Sprint's case in chief and was put into evidence by Sprint." Sprint's trial counsel stated: "Before the testimony of M[r.] Souder and Mr. Franklin, I personally asked each of the lawyers and ensured that they did not have client representatives here. The only people who were here from the other defendants were lawyers who are bound by the protective order."

the fact that Sprint has a relatively low collection rate for involuntary terminators and think, 'I don't need to pay my bills because Sprint probably won't be able to collect from me,' . . . ." Sprint also argued that it narrowly tailored its motion to seek the sealing of only 200 of 1,600 pages of transcript.

Sprint closed its argument by requesting, "if after the hearing the Court still feels inclined to deny the motion, that Sprint be provided an opportunity to provide a more substantial declaration more narrowly targeting the particular excerpts that Sprint finds confidential or competitively sensitive given the fact that we had a very limited time frame in which to file this motion in the first place." The court on its own initiative suggested it might allow further briefing on Exhibit 775 because the exhibit "has some information that's more current than other information." Plaintiffs did not object and Sprint's attorney stated, "I will call right now and get that declaration under way." Sprint filed the declaration the next day.

On June 11, 2008, the court issued a written order denying Sprint's motion except as to Exhibit 775. The court explained its ruling as follows: "California law permits the sealing of Court records where a party meets the requirements of California Rule of Court 2.550 and 2.551 and the standards of Rule 2.550(d).

"Evidence. Rule of Court 2.550(d) requires the Court to make certain express factual findings. Rule of Court 2.551(a) states that a motion must be accompanied by 'a declaration containing facts sufficient to justify the sealing.' Sprint's motion is supported by the 6/6/08 Declaration of Savelle, who is an attorney at Quinn Emanuel. There is no testimony or documentary evidence from Sprint explaining why the subject matter of the trial testimony at issue is confidential business information. Without evidence the Court cannot make the factual findings required by Rule 2.550(d).

"An overriding interest that overcomes the right of public access to the record. . . . An overriding interest may be a party's interest in protecting trade secrets, but it may also be a party's interest in protecting business information that does not rise to the level of a trade secret, . . . or some other interest. [Citation.] . . . [¶] The trial testimony and documents at issue concern Sprint's financial information (income, costs, etc.) and its

business practices (pricing methodology, collections, etc.) Sprint has not demonstrated that the financial information is confidential. Sprint is a public company and most of the financial information has been disclosed in 10-Ks, 10-Qs and otherwise. Sprint has not demonstrated that the business practices are confidential. There is no evidence that Sprint used proprietary methods of analysis. To the contrary, the trial evidence suggests that Sprint used well known established methods of business analysis in their decisions. The results of Sprint's decisions are public and are the subject of this lawsuit. There is no evidence that Sprint placed restrictions on the disclosure of its business practices by current or former employees. Even if the information about business practices was confidential when the decisions were made, the decisions are now several years old, suggesting that the information is now stale and no longer derives much, if any, value from its alleged confidential nature. *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451–1452. Sprint has not demonstrated that the identified evidence was or remains confidential business information.

"The overriding interest supports sealing the record. Assuming that the trial testimony was and remains 'confidential business information,' Sprint has not demonstrated that an overriding interest in the alleged confidentiality of the trial testimony supports sealing the record. 'Substantive courtroom proceedings in ordinary civil cases, and the transcripts and records pertaining to these proceedings, are 'presumptively open.' [Citations.] The alleged confidentiality of the trial testimony does not overcome the presumption of a public trial.

"A substantial probability that the overriding interest will be prejudiced if the record is not sealed. Sprint has not demonstrated a substantial probability of prejudice if the record is not sealed.

"The proposed sealing is narrowly tailored. Sprint's proposed sealing is somewhat narrowly tailored. Sprint seeks to redact pages of testimony rather than to place the entire trial under seal, but Sprint has not focused on specific sentences or dollar figures that could be selectively redacted.

"Whether less restrictive means exist to achieve the overriding interest. The Court used a less restrictive means to prevent the pre-trial disclosure of the information. The Protective Order of 6/18/04 ensured that discovery was used as a tool for developing evidence to be presented at trial and not as a tool for 'generat[ing] settlement leverage by creating burden, expense, embarrassment, distraction.' [Citations.] At this stage, the information has been disclosed in the context of a jury trial on the merits, when the public interest is much higher than in discovery, and the information is now reasonably stale, so it is of presumably less commercial value.

"Public interest. An exhibit to Sprint's ex-parte application states that the FCC will be conducting a hearing on ETFs on Thursday, June 12, 2008. [Citation.] This suggests that the testimony concerns a matter of public interest. [Citation.]

"Timeliness/waiver. The trial testimony was presented in open Court on May 29-30 and June 2-4, 2008. The exhibits have also been presented to the trier of fact. . . . Having been presented in open Court, the trial testimony has been disclosed to the public and the Court will not order it sealed ex post facto. '[T]here can be no privacy with respect to a matter which is already public or which has previously become part of the "public domain." . . . [O]nce the information is released, unlike a physical object, it cannot be recaptured and sealed.' *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1245. This is an alternative ground for denying the motion. [¶] Sprint's filing of its motion after disclosure in open Court could also be viewed as an implied waiver by Sprint of any claim that the trial testimony concerned confidential business information. . . .

"Exhibit 775. The Court will keep Exhibit 775 conditionally under seal because the Court's review of the document suggests that it might contain some information of current commercial value. Sprint may file a supplemental memorandum supported by evidence in support of sealing all or part of Exhibit 775 on or before June 11, 2008, at 4:00 p.m. Plaintiffs must file any opposition on or before June 13, 2008, at 10:00 a.m." (Citation and paragraph format omissions added.)

As noted, Sprint filed a declaration in support of sealing Exhibit 775 on June 11, 2008; the declaration also asked the court to seal Exhibit 522, which contained similar

information. On June 12, the court issued a written order granting the motion in part: "Sprint has demonstrated that Exhibit 755 contains some information that should be sealed under the standards of Rule 2.550(d) . . . and has demonstrated that Exhibit 522 contains comparable information. [¶] The Court ORDERS that Sprint file public redacted versions of Exhibits 522 and 755 on or before June 20, 2008. Sprint may redact information concerning prices, subsidies, and related information from January 1, 2004, to the present, as that information presumably has commercial value. Sprint may not redact information on or prior to December 31, 2003, as that information is stale and has less commercial value. *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451–1452."[4]

On June 13, 2008, Sprint filed a petition for a writ of mandate challenging the court's June 11, 2008 order denying its motion to seal. We denied the petition. (*Sprint Spectrum, L.P. v. Superior Court* (June 17, 2008, A121794) [nonpub. order].) On June 19, 2008, Sprint filed this appeal of the June 11 order. Sprint also filed a petition for a writ of supersedeas, which we denied. (*Sprint Spectrum, L.P. v. Ayyad* (June 23, 2008, A121870) [nonpub. order].)[5]

DISCUSSION

Sprint challenges the trial court order primarily on procedural grounds, arguing the court abused its discretion by denying the motion after an expedited hearing, based on the

[4] In its June 12, 2008 written order, the court also granted Sprint's request for expedited briefing on a further motion to seal. Sprint filed that motion with supporting papers on June 12, 2008. The motion sought to seal additional transcript excerpts and trial exhibits. The court granted the motion in part on June 24, 2008. Sprint appealed the June 24, 2008 order and we affirmed in July 2009. (*Ayyad v. Sprint Spectrum, L.P.* (July 24, 2009, A122709) [nonpub. opn.].)

[5] On July 1, 2008, Sprint filed a motion for reconsideration of the court's June 11, 2008 order. The court denied the motion August 1, 2008, on the ground that it lacked jurisdiction to reconsider the order, which was already on appeal. On January 23, 2009, Sprint appealed the August 1, 2008 order. (*Ayyad v. Sprint Spectrum, L.P.* (A124082, app. pending).) Briefing is not yet complete in that appeal. On January 26, 2009, Sprint filed a motion to stay briefing in this appeal so that it could be consolidated with appeal number A124082. We denied the motion on February 2, 2009.

inadequacy of Sprint's evidentiary showing without then providing an opportunity for Sprint to supplement that showing (except as to Exhibit 775). In order to put the procedural issue in context, we review the substantive standards for the sealing of trial evidence.

"[I]n general, the First Amendment provides a right of access to ordinary civil trials and proceedings . . . ." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1212 (*NBC Subsidiary*).) "[O]pen trials serve to demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings [citation]; '[m]ore importantly,' open trials provide a means, 'akin in purpose to the other checks and balances that infuse our system of government,' by which citizens scrutinize and 'check' the use and possible abuse of judicial power [citation]; and finally, 'with some limitations' [citation], open trials serve to enhance the truth-finding function of the proceeding [citation]." (*Id*. at pp. 1201–1202, quoting Justice Brennan's concurring opinion in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555 [public access to criminal trial]; see *NBC Subsidiary*, at p. 1211 [concluding same principles apply to civil trials].) " 'Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding. In that sense, public access is an indispensible element of the trial process itself. . . .' [Citation.]" (*NBC Subsidiary*, at p. 1202.)

The right of public access, however, is not unrestricted. (*NBC Subsidiary, supra,* 20 Cal.4th at p. 1211.) "[T]he presumption of openness can be overcome upon a proper showing." (*Ibid*.) Closure of civil trials is allowed if two factors are satisfied. (*Id*. at p. 1217.) "First, a trial court must provide notice to the public of the contemplated closure. . . . [¶] Second, *before* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest."

(*Id*. at pp. 1217–1218, fns. omitted.) These principles have been incorporated into rules 2.550[6] and 2.551 (former rules 243.1 & 243.2). (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298 & fn. 3 (*Providian*).) "With the passage of Proposition 59 effective November 3, 2004, the people's right of access to information in public settings now has state constitutional stature . . . . (Cal. Const., art. I, § 3, subd. (b)[, par.] (1).)" (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597 (*Savaglio*).)

The determination of the scope of public access is committed to the trial court's discretion. (*Providian, supra,* 96 Cal.App.4th at p. 299.) The party seeking a sealing order bears the burden of overcoming the presumption of public access. (*Id*. at p. 301.) We review the trial court's determination for abuse of discretion. (*Id*. at p. 299.)

Rule 2.551 sets for the procedural requirements for moving to seal trial records. "A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing the facts sufficient to justify the sealing." (Rule 2.551(b)(1).) "The party requesting that a record be filed under seal must lodge it with the court under (d) when the motion or application is made, unless good cause exists for not lodging it . . . ." (Rule 2.551(b)(4).) A record is "lodged" when it is placed it in a sealed envelope or container, labeled "CONDITIONALLY UNDER SEAL," affixed with a cover sheet, and delivered to the court. (Rule 2.551(d).) Pending determination of the motion, the lodged record is kept conditionally under seal separate from the public file in

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[6] Rule 2.550 provides in relevant part:

"(c) *Court records presumed to be open* [¶] Unless confidentiality is required by law, court records are presumed to be open.

"(d) *Express factual findings required to seal records* [¶] The court may order that a record be filed under seal only if it expressly finds facts that establish: [¶] (1) There exists an overriding interest that overcomes the right of public access to the record; [¶] (2) The overriding interest supports sealing the record; [¶] (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; [¶] (4) The proposed sealing is narrowly tailored; and [¶] (5) No less restrictive means exist to achieve the overriding interest."

the case. (Rule 2.551(b)(4), (f).) "A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion or an application to seal." (Rule 2.551(c).)

Sprint failed to comply with these procedural requirements. First, neither its June 5, 2008 declaration nor the declaration it filed with its June 6, 2008 motion to seal "contain[ed] facts sufficient to justify the sealing." (Rule 2.551(b)(1).) The declaration simply identified and attached the records at issue. It provided no factual support for a finding that the information in those records had been kept confidential by Sprint, that disclosure of the information would prejudice Sprint competitively or otherwise, or that Sprint's interest in maintaining the confidentiality of the records outweighed the public interest in disclosure. Second, Sprint did not maintain the confidentiality of the records pending the court's ruling on its motion to seal, as contemplated by rule 2.551(c) and (d). Rather, Sprint disclosed the information at the trial and moved to seal the records only after the proverbial barn door had long since been opened wide and a further public dissemination of the information came to its attention.

Sprint argues it did not have a fair opportunity to comply with the procedural requirements of rule 2.551 because the trial court required it "to file [the] motion to seal overnight and then den[ied] the motion for lack of adequate support." This is a gross distortion of the procedural posture of Sprint's motion. Sprint was on notice as of June 2004 at the latest (by way of the protective order, which expressly reserved and anticipated further court action regarding trial evidence) that it needed to meet rule 2.551's requirements if it wished to protect the confidentiality of information presented at trial. At some point before or early in the trial, the court apparently directly inquired how Sprint intended to address the confidentiality issue. Rather than seeking assistance from the court, Sprint elected a self-help approach: it informally monitored who was physically present in the courtroom during the presentation of what it deemed to be confidential evidence and purportedly asked certain party-related individuals to leave the courtroom. Sprint took no formal action to protect the confidentiality of its information even though Plaintiffs had previously told Sprint they would "oppose Sprint's

confidential designations," and even though Sprint's counsel could not possibly have been unaware that a publicly accessible written record of the proceedings was being prepared. Having taken such a casual approach during trial and then seeking a emergency response from the court on the eve of jury deliberations, Sprint cannot fairly complain that the court imposed an unreasonably expedited briefing and hearing schedule, and the court clearly articulated the reasons necessitating that schedule.

Sprint suggests it was lulled into filing an inadequate declaration by the court's past practice of granting motions to seal on similarly limited showings. The critical distinction between those pretrial motions and the motion at issue in this appeal is that (insofar as the appellate record discloses) the pretrial motions were filed *before* Sprint publicly disclosed the records it was asking the court to seal, and *before* Sprint had then presented those records to the court and the jury as a basis for trial adjudication of the issues in the case. Sprint's June 6, 2008 motion to seal was filed days *after* Sprint had presented the testimony and exhibits in open court, despite pretrial inquiries by the trial court and Plaintiffs' known opposition to the sealing of the records.

Sprint also argues it was impossible to prepare an adequate declaration in one day in response to the court's June 5, 2008 scheduling order. However, Sprint was nevertheless able to produce such a declaration in a single day when the court invited further briefing on Exhibit 775.

Sprint argues the trial court abused its discretion by denying relief on the merits based on a curable procedural defect. It relies on *Elkins v. Superior Court*, which holds that "courts ordinarily should avoid treating a curable violation of local procedural rules as the basis for crippling a litigant's ability to present his or her case." (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1364 (*Elkins*).) In *Elkins*, a pro se litigant in a marital dissolution action did not comply with a local rule requiring the pretrial filing of a declaration that established the admissibility of all of the evidence he intended to introduce at trial. (*Id.* at pp. 1363–1364.) As a sanction, the trial court excluded all of the evidence, essentially precluding the litigant from presenting his case on the division of the marital property. (*Id.* at pp. 1349–1350.) The Supreme Court held that the

"sanction was disproportionate and inconsistent with the policy favoring determination of cases on their merits." (*Id.* at p. 1364.)

Even if we were willing to assume that the trial court here denied Sprint's motion based on a curable procedural default, *Elkins* and the cases it cites are distinguishable because the procedural sanctions in those cases resulted in a judgment against the defaulting party on the merits of a cause of action. (See *Elkins, supra,* 41 Cal.4th 1337; *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1161 ["a curable procedural defect . . . which effectively results in a judgment against a party"]; *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 30 [refusal to consider untimely opposition to motion for summary judgment, which was granted]; *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1216 [terminating sanctions such as an order granting summary judgment]; *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 97–98 ["[s]anctions which have the effect of granting judgment to the other party"].) Here, the court's order simply allowed the records already presented in a public forum to remain in the public domain, which is the presumptive disposition when the court is presented with a motion to seal documents presented at a trial. (Rule 2.550(c).) The order did not result in a judgment against Sprint or a partial adjudication of a cause of action in Plaintiff's favor.

In any event, the record clearly establishes that the court did not deny Sprint's motion to seal solely on the basis of procedural default. The court considered and discussed the content of the records Sprint wanted sealed and found that Sprint's interest in protecting the confidentiality of those records did not outweigh the public's interest in accessing the records. The court commented that the business practices described in the testimony were well known and well established, that much of the allegedly confidential information was out of date and thus of reduced competitive value, and that the "results of Sprint's decisions are public and are the subject of this lawsuit." The documents and testimony at issue here were presented at trial, and the documents received in evidence. The information contained in the documents, and the related testimony, was presumably directly relevant to the key issues in the case and formed part of the basis for

adjudication. Our rules of court restricting sealing of evidence and exhibits " 'recognize the First Amendment right of access to documents used at trial or as a basis of adjudication.' [Citation.]" (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 84.) Thus, Sprint had the burden of establishing that its private interests outweighed the constitutionally protected interest of the public to be able to follow and evaluate the judicial proceedings, one of the central purposes of the presumption in favor of public access. That the court on its own initiative singled out Exhibit 775 as an exhibit that might properly be sealed under the substantive standards further supports an inference that the court considered the merits of the motion as to each record and did not deny the motion solely based on a procedural default.

The trial court was well positioned to consider the substantive merits of Sprint's motion despite the limited factual showing Sprint made in support of the motion. The court had presided over much of the consolidated proceedings and the entire trial in this severed case and thus was intimately familiar with the business information that was disclosed during those proceedings and their relevance to the legal issues in the case. The court reasonably could take Sprint's failure to evidence greater urgency in seeking to limit access to the records during trial as an indication of the company's lesser interest in protection of the allegedly confidential information. The court had more than sufficient information before it to properly weigh the extent of Sprint's private interests in protecting its information against the public's interest in maintaining access to the trial evidence.

Finally, Sprint argues that the court's partial grant of the motion as to Exhibit 775 and its partial grant of Sprint's June 12, 2008 supplemental motion to seal were inconsistent with its denial of the motion before us on appeal. Specifically, Sprint cites the court's statement in the June 11 order that it was denying the motion in part because the records had already been disclosed to the public and " 'once the information is released, unlike a physical object, it cannot be recaptured and sealed.' [Citation.]." In its June 24, 2008 order, the court determined that similar information could effectively be sealed despite its disclosure during trial. The court's apparent reconsideration of this

issue does not render the order on appeal arbitrary and capricious. In its June 11 order, the court cited public disclosure as an "alternative ground for denying the motion." For the reasons already stated, the other grounds cited by the trial court fully support its decision.

Because we affirm the trial court's order denying Sprint's motion to seal records that were presented during trial, we also deny Sprint's motion to seal those same records in this appeal.

DISPOSITION

The June 11, 2008 order denying in part Sprint's motion to seal portions of the trial transcript and certain exhibits is affirmed. Sprint shall pay Plaintiffs' costs on appeal.

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Bruiniers, J.

We concur:

_____
Simons, Acting P. J.

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Needham, J.